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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 369

BETHLEHEM STEEL COMPANY,
Appellant,

vs.

ARTHUR J. MOORES

STATEMENT AS TO JURISDICTION

Pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States the petitioner for the allowance of its appeal in the above-entitled case hereby submits its jurisdictional statement.

I

Statutory Provisions Sustaining Jurisdiction

Jurisdiction for the appeal is provided by Title 28, United States Code, Section 1257 (Act of June 25, 1948, Public Law 773 (H.R. 3214), 80th Congress, Second Session), which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

• • • • • • •

II

The State Statute, the Validity of Which Is Involved

The appeal involves the validity of the Massachusetts Workmen's Compensation Act. (Mass. G.L. (Ter. Ed.) c. 152, printed commencing at page 1910 of the General Laws of Massachusetts, Tercentenary Edition (1932)). Its pertinent provisions, as amended, are set forth in Appendix A hereto.

III

Date of Judgment and Decree Sought to Be Reviewed and Date of Presentation of Application for Appeal

The judgment and rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered under date of July 2, 1948, and the decree of the Superior Court of the Commonwealth of Massachusetts for Suffolk County pursuant to said rescript was entered under date of September 20, 1948. A copy of the opinion rendered by the Supreme Judicial Court on July 2, 1948 is annexed hereto as Appendix B.

The petition for appeal is presented herewith on September 24, 1948.

IV

Nature of the Case and the Rulings Which Give Jurisdiction

This case involves a claim for compensation under the Massachusetts Workmen's Compensation Act filed by the appellee with the Massachusetts Industrial Accident Board

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on April 12, 1946 (R. 1, 59). Compensation was claimed by the appellee for an injury sustained to his right hand on June 28, 1945, as a result of slipping on a gun mount aboard a vessel (R. 69).

The vessel on which the appellee's injury was sustained was a 475 ft. tanker chartered by the United States Government from the Atlantic Refining Company, its owner, and used in the Atlantic in oil service, transporting oil from Venezuela to Halifax (R. 70, 4). Due to an explosion somewhere in the waters off Cape Cod, it suffered damage to about 40 or 50 feet of its stern, was rendered unseaworthy, and was towed to the appellant's East Boston yards on April 7, 1945, where it was cradled in dry dock for repairs (R. 70).

The floating dry dock, upon which the vessel was cradled and was undergoing repairs at the time of appellee's injury, was in Boston Harbor and in navigable waters of the United States (R. 4).

Appellee's work was variously on land, dry docks, and ships. He was classified as a "rigger, first class." Some of the time, including the time of injury, he was a "top tag man," directing the efforts of other "tag men" fixing crane chain hooks onto material and directing its movement between piers, dry docks, and ships. When the injury occurred he was climbing the gun mount to get in a position where the crane operator could see his signals (R. 7). Prior to his employment with the appellant, which commenced in January of 1944, appellee's work had been that of an iron worker and rigger on land (R. 70).

Within five days from the time of the injury, the accident was reported in due form to the Deputy Commissioner administering the Longshoremen's and Harbor Workers' Compensation Act in the First Compensation District. The Deputy Commissioner advised the appellee that, if

disabled for more than seven days, he would be entitled to compensation and should apply therefor to the appellant. The appellee attended three conferences at the Deputy Commissioner's office, as a result of which he received an impartial medical examination and a copy of the impartial physician's report. Following that, he was present at still another conference at the Deputy Commissioner's office (R. 4, 5, 7). Thereafter the appellee filed the aforesaid claim with the Department of Industrial Accidents (R. 5). Appellee admitted in the courts below that claim for compensation for the same injury had also been filed with the Deputy Commissioner under the Federal Act.

Hearings on the claim filed under the State Act were held by a member of the Industrial Accident Board on June 25, 1946 and January 16, 1947 (R. 2). The member's report and decision, ruling that the Board had jurisdiction of the claim and finding that the appellee had incurred a disability, was filed on June 2, 1947 (R. 64).

Thereafter, on July 28, 1947 a reviewing board of the Industrial Accident Board held a hearing upon the appellant's claim for review of the aforementioned decision (R. 65). On October 30, 1947 the reviewing board filed its decision, likewise ruling in favor of its jurisdiction and finding that a disability had occurred, and ordering the payment of compensation (R. 65-72).

The appellant duly appealed from, and presented certified copies of the Board's decision to the Superior Court of the Commonwealth of Massachusetts for the County of Suffolk, and on December 16, 1947 said Court entered its decree based upon the aforementioned decision of the board, ordering payment by the appellant to the appellee of compensation in the amount of $1,494.29 to June 2, 1947 and $20 per week thereafter, plus costs and attorneys' fees (R. 73).

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On December 19, 1947 the appellant appealed from the aforementioned decree of the Superior Court to the Supreme Judicial Court for the Commonwealth of Massachusetts (R. 74). The case was argued before said Court on April 6, 1948. On July 2, 1948 the Court issued its rescript, affirming the decree of the Superior Court, and rendered its opinion (Appendix B).

By letter dated July 22, 1948 and addressed to the Chief Justice of the Supreme Judicial Court—the customary procedure for requesting a rehearing, there being no formal provisions therefor—the appellant requested a rehearing of the case. By letter from the Chief Justice dated September 14, 1948 counsel for the appellant were advised that the request for a rehearing was denied by the Court.

The principal issue throughout the proceedings was whether the Massachusetts Workmen's Compensation Act could validly be applied to the appellee's injury and claim for compensation.

The single member of the Industrial Accident Board ruled that—

> "I deny exclusive jurisdiction of the Federal Government under the Longshoremen's and Harbor Workers' Act in the present case but do not pass on the question of concurrent jurisdiction of the State and Federal agencies and courts." (R. 62)

The reviewing board likewise ruled that the Workmen's Compensation Act could validly be applied to appellee's injury, on the ground that the appellee's work was not maritime in character. (R. 71)

In accordance with the practice in workmen's compensation cases, the Superior Court made no specific rulings on the question of applicability of the Workmen's Compensation Act or the jurisdiction of the Industrial Accident Board thereunder, but its decree ordered the payment of compensation pursuant to the provisions of that Act. (R. 73)

The opinion of the Supreme Judicial Court, recognizing "the established proposition" that certain maritime injuries are excluded from the Massachusetts Workmen's Compensation Act "by the constitutional grant of admiralty and maritime jurisdiction to the United States" (Opinion p. 2, emphasis supplied), held that, by virtue of the decision of the Supreme Court of the United States in *Davis* v. *Department of Labor and Industries*, 317 U.S. 249, "the situation was definitely altered" (p. 4) and that the case "now comes within the workmen's compensation law of this Commonwealth" (p. 5). Almost the entire opinion is devoted to a consideration of the validity of the Workmen's Compensation Act as applied to this case, and the holding was in favor of its validity.

A case which appellant believes sustains the jurisdiction of the United States Supreme Court is,

Dahnke-Walker Milling Company v. *Bondurant*, 257 U. S. 282, most recently cited on the jurisdictional point by this Court in *Fleming* v. *Rhodes*, 331 U. S. 100, 103 n. 4.

V

The Fashion in Which the Federal Point Was Raised

The constitutionality of the Workmen's Compensation Act as applied to this case was raised initially by the Appellant's motion, made before the single member on June 25, 1946, that the appellee's claim be dismissed for want of jurisdiction of the Department of Industrial Accidents. It also appears of record that a copy of the Longshoremen's and Harbor Workers' Compensation Act, upon which the appellant partly relied in support of its motion to dismiss, was made a part of the record before the single member (R. 25).

In his decision the member stated:

"The self-insurer (appellant) contends that jurisdiction of this case comes exclusively under the Federal

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Act, *33 U. S. Code, Sec. 903A, Jurisdiction*, and relies upon *Parker* vs. *Motor Boat Sales*, 314 U.S. 244 (1941), and other cases to uphold its position that the injured workman's employment entitled him only to benefits under the Federal Act.". (R. 60)

Before the reviewing board the appellant again presented a motion for dismissal for want of jurisdiction. (R. 65) The decision of the reviewing board further shows that it was

> "the contention of the self-insurer in this case that the Massachusetts Workmen's Compensation Law has no application to this case." (R. 69)

In the proceedings before the Superior Court the appellant likewise insisted upon the lack of jurisdiction of the Industrial Accident Board, arguing the Federal question at length both orally and in its brief, and requested a dismissal of appellee's claim on that ground. But in accordance with the usual practice in Massachusetts, the record before the said Court is limited to showing its decree.

In its brief filed with the Supreme Judicial Court, the appellant again specifically and insistently contended that the Workmen's Compensation Act could not constitutionally be applied to the case—

> "1. Because, as a matter of constitutional law, the case was within the exclusive jurisdiction of the Federal government over maritime matters so that the State had no jurisdiction even apart from the existence of Congressional legislation on the subject.
>
> "2. Because, as a matter of paramount Federal legislation, the case was within the exclusive coverage of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*)" (Brief, p. 9).

These points were likewise argued orally before the Supreme Judicial Court.

Thus the appellant raised and insisted upon the Federal question throughout the proceedings before the single member, reviewing board and lower courts, in every appropriate way.

VI

The Questions Involved Are Substantial

It is believed that this case presents not merely one special set of facts, but presents a *characteristic* set of facts upon the basis of which the decision will govern all ship repair work.

The appellant's contention was and is that the injury sustained by the appellee in ship repair work on navigable waters was not only within the exclusive jurisdiction of the Federal Government over maritime matters under Article III, Section 2 and Article I, Section 8 of the Constitution, but was also within the exclusive coverage of the Longshoremen's and Harbor Workers' Compensation Act. The ruling below, that the provisions of the State Act are validly applicable to an injury of this character, is novel and of far-reaching and disturbing implications.

Article III, Section 2 of the United States Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction". Article I, Section 8 gives Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." These provisions, together with the provisions of Section 9 of the Judiciary Act of 1789 (1 Stat. 76, 77) giving the District Courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction", were the basis of the

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holding in *Southern Pacific Company* v. *Jensen*, 244 U. S. 205 and a long line of subsequent cases, to the effect that a State workmen's compensation act cannot constitutionally be applied to an injury occurring in the course of maritime employment upon navigable waters. In addition to the *Jensen* case, see *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Washington* v. *Dawson & Co.*, 264 U. S. 219; *Northern Coal and Dock Co.* v. *Strand*, 278 U. S. 142; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244; and particularly cases involving industrial injuries sustained in ship repair work on navigable waters, such as *Gonsalves* v. *Morse Dry Dock and Repair Co.*, 266 U. S. 171; *Robins Dry Dock and Repair Co.* v. *Dahl*, 266 U. S. 449; and *John Baizley Iron Works* v. *Span*, 281 U. S. 222.

Furthermore, the Longshoremen's and Harbor Workers' Compensation Act (the pertinent provisions of which are set forth in Appendix C) has given the doctrine of the *Jensen* and related cases the force of a statutory rule. Section 3(a) of that Act (33 U. S. C., Section 903 (a)) provides Federal coverage:

> ". . . if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law".

And if the appellee's injury came within the Federal Act, his remedy was *exclusively* under that Act. This is Expressly so provided in Section 5 of the Federal Act (33 U. S. C. Section 905):

"The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee. . . ."

Under the Supremacy Clause of Article VI, Clause 2 of the Constitution, the Federal Act, no less than the Constitution itself, is made "the supreme law of the land; . . . anything in the Constitution or laws of any State to the contrary notwithstanding."

Under these constitutional and statutory provisions the Massachusetts Workmen's Compensation Act was plainly invalid as applied to this case.

The Supreme Judicial Court did recognize that, under the *Jensen* doctrine as applied by the Supreme Court and the State Court itself prior to the Supreme Court's decision in *Davis* v. *Department of Labor and Industries,* 317 U. S. 249, it would have been required "to dismiss the claim under the State compensation Law, as was done in *O'Hara's Case* (248 Mass. 31)" (Opinion p. 4). The Court felt, however, that "the situation was definitely altered by the decision in" the *Davis* case (*ibid*). It regarded the *Davis* case as "intended to be a revolutionary decision . . . and as designed to include within a wide circle of doubt all water-front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other" (Opinion p. 5).

In our view, the *Davis* decision applies to "twilight zone" cases (317 U. S. at 256), such as the bridge dismantling incident there involved, but does not destroy the long-established, and heretofore satisfactorily working, rule in ship repair cases.

In view of the sweeping effect attributed to the *Davis* case by the Massachusetts Court, and in view of its recognition that previous law would definitely have excluded State jurisdiction over this case, the Court has interpreted the *Davis*

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decision as extending the "twilight zone" to cover ship repair cases, on which the law has previously been clear.

The *Davis* case sought and found a proper solution for a vexing situation involving work of a strongly local character, the jurisdictional status of which had never before been adjudicated. It can have no bearing upon injuries in ship repair work coming not only within the range of adjudication in the *Jensen* line of cases but also within the express and exclusive coverage of the Federal Act and within the administrative machinery set up by it. The *Davis* case itself reiterated that—

> "In our decision in *Parker* v. *Motor Boat Sales*, 314 U. S. 244, we held that Congress has by the Longshoremen's Act accepted the *Jensen* line of demarcation between state and federal jurisdiction." (317 U. S. at 256)

And in the *Parker* case, the Court had construed the Federal Act as having been intended to—

> ". . . correct a gap made plain by decisions of this Court. We believe that there is only one interpretation of the provision in § 3 (a) which would accord with the aim of Congress; the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the *Jensen* line of decision excluded from state compensation laws." (314 U. S. at 250)

The decision in the case at bar, if allowed to stand, would result in jurisdictional chaos. It is difficult to conceive of an injury occurring during repair of a completed ship to which both the Federal and State Act could not be held to apply. The great public importance of maintaining established jurisdictional principles in the field of workmen's compensation cannot be overemphasized. Increased litigation on the issue of jurisdiction, delay in the making of voluntary payments, and the opportunity for selection of

jurisdiction according to counsel's interest rather than that of the client are only a few of the unfortunate consequences which would follow the almost unlimited extension of the "twilight zone" doctrine as interpreted by the Massachusetts Court. Indeed, that Court itself recognized that in order to fix the boundaries of the "new 'twilight zone'," the *Davis* case, as interpreted by it, "gives us no rule or test other than the indefinable and subjective test of doubt" (Opinion p. 4).

The questions involved in the instant case thus are of the greatest substance. What is at stake is not merely jurisdiction over a single injury, whose maritime and therefore exclusively Federal status has not been subject to doubt for many years. It is, among other things, the question whether the workmen's compensation system established by Congress more than two decades ago has lost its integrity, and whether a long settled and uniform course of administration should now be overturned.

Conclusion

In this case there was drawn in question the validity of a State statute on the ground of its being repugnant both to the Constitution and the laws of the United States, and the decision was in favor of its validity. The questions involved are of genuine substance and importance. It is, therefore, respectfully submitted that the appellant is entitled as of right to review of the case by the Supreme Court of the United States.

September 24, 1948.

SIMON P. TOWNSEND,
CONRAD W. OBERDORFER,
WM. DWIGHT WHITNEY,
Of Counsel.

CHOATE, HALL & STEWART,
CRAVATH, SWAINE & MOORE,
Counsel for Appellant.

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APPENDIX A

PERTINENT PROVISIONS OF THE MASSACHUSETTS WORKMEN'S COMPENSATION ACT (MASSACHUSETTS GENERAL LAWS (TER. ED.). CHAPTER 152 AS AMENDED)

Section 1. Definitions—The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:

. . . . . .

(2) "Department," the department of industrial accidents.

. . . . . .

(4) "Employee," every person in the service of another under any contract of hire, express or implied, oral or written . . . (with certain exceptions not here material).

(5) "Employer," an individual, partnership, association, corporation or other legal entity, . . . employing employees subject to this chapter.

(6) "Insured" or "Insured Person," an employer who has provided by insurance for the payment to his employees by an insurer of the compensation provided for by this chapter, or is a self-insurer under subsection 2 (a) or 2 (b) of section twenty-five A.

. . . . . .

Section 7. Hearing by One Member—If the insurer and the injured employee fail to reach an agreement in regard to compensation . . . either party may notify the department, which shall thereupon assign the case for hearing by a member thereof.

. . . . . .

Section 8. Investigation by the Member—Such member shall make such inquiries and investigations as shall be

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deemed necessary. The hearing shall be held in the town where the accident occurred or in such other place as the department may designate; and the decision of the member, together with a statement of the evidence, his findings of fact, rulings of law, and other matters pertinent to questions arising before him, shall be filed with the department. Unless a claim for review is filed by either party within seven days, the decision shall be enforceable under section eleven.

. . . . . .

Section 10. Hearing by Reviewing Board . . . If a claim for a review is filed under section eight, the reviewing board shall hear the parties, and may hear evidence in regard to pertinent matters and may revise the decision in whole or in part, or may refer the matter back to the member for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties . . .

. . . . . .

Section 11. Powers of Superior Court—Any party in interest may present certified copies of an order or decision of the reviewing board . . . , and all papers in connection therewith, to the Superior Court for the county in which the injury occurred or for the county of Suffolk . . . The court shall thereupon render a decree in accordance therewith and notify the parties. Such decree shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact . . .

. . . . . .

Compulsory Compensation and Self-Insurance

Section 25A. Compensation Compulsory; Provision for Self-Insurance—In order to promote the health, safety and welfare of employees, every employer shall provide for the

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payment to his employees of the compensation provided for by this chapter in the following manner:—

(1) By insurance with an insurer, or

(2) Subject to the rules of the department, by obtaining from the department annually a license as a self-insurer . . .

• • • • • • •

Payments

Section 26. Payments; Presumption of Employment; Extra-territoriality—If an employee who has not given notice of his claim of common law rights of action . . . receives a personal injury arising out of and in the course of his employment, . . . he shall be paid compensation by the insurer or self-insurer, as hereinafter provided . . .

APPENDIX B

PERTINENT PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT (Act of March 4, 1927, c. 509, 44 Stat. 1424, as amended, 33 U. S. C. §901 *et seq.*)

• • • • • • •

Sec. 2 Definitions—When used in this Act—

(2) The term "injury" means accidental injury or death arising out of and in the course of employment . . .

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

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(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

• • • • • • •

Sec. 3. Coverage—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . .

• • • • • • •

Sec. 4. Liability for Compensation—(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 . . .

• • • • • • •

Sec. 5. Exclusiveness of Liability—The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . .

• • • • • • •

Sec. 20. Presumptions—In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

• • • • • • •

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APPENDIX "C"

QUA, C.J. The self insurer appeals from a decree of the Superior Court awarding compensation under the workmen's compensation law to the employee for an injury suffered by him on June 28, 1945, as the result of slipping on the step of a gun mount, while he was aboard a vessel in a dry dock floating in navigable water at the self insurer's plant at East Boston.

The principal question relates to the applicability of the State compensation law. The board's subsidiary findings of fact, which must control if there is any inconsistency between them and more general findings, are in substance these: The vessel was a four hundred seventy-five foot tanker chartered by the United States government. An explosion somewhere off Cape Cod had disabled her and had damaged about forty or fifty feet of her stern. She was towed to East Boston for repairs. Work was begun "June 8 to 28th." The vessel was under repair until December 20, completion being delayed by the necessity of obtaining new castings. The employee had been for many years an iron worker and rigger on land. His employment by the self insurer began January 11, 1944. His work was variously on piers, dry docks and ships at the self insurer's plant, where he was classified as a "rigger." Some of the time as "top tag man" he directed the efforts of other "tag men," fixing the hooks which were on the chains of the cranes to material to be moved and directing its movement from piers on land to dry docks or ships. There was much conflict in the evidence, including the testimony of the employee, as to the proportion of his time spent on the piers and the proportion spent on the dry docks and vessels, but the board found that as "tag man" the major portion of his work was on the piers, but occasionally it took him aboard vessels. The employee testified that at the time he was injured "he was going to get where his operator [the crane operator] could see him, so that he could give signals." The floating dry dock was fastened to the pier to which it was berthed by bolts spanning a distance of three or four feet from the pier itself.

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We start with the established proposition that the Massachusetts workmen's compensation law covers all longshore maritime injuries not excluded by the constitutional grant of admiralty and maritime jurisdiction to the United States. *Gillard's Case*, 244 Mass. 47. *Toland's Case*, 258 Mass. 470, 471-472. *Herbert's Case*, 283 Mass. 348, 350. *Lauzon's Case*, 302 Mass. 294, 295. See *Dorman's Case*, 236 Mass. 583, 584.

But since the decision in *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, it has been necessary to observe carefully the line of demarcation between State and Federal authority as defined by a series of decisions of the Supreme Court of the United States following that case. In *O'Hara's Case*, 248 Mass. 31, decided in 1924, it appeared that the two injured employees were, at the times of their respective injuries, working on dry docks, one of which was floating and moored to piers and the other of which rested upon and was attached to land, and that each employee was engaged in the general work of repairing a previously completed vessel. The circumstances cannot, in our opinion, be distinguished in any material respect from those presented in the case at bar. This court reviewed at length the Federal decisions up to that time and stated as its conclusion the following: "The principle deducible as we think from all these decisions is that the rights and liabilities of parties with respect to injuries received by a workman engaged in repair of a completed vessel lying in navigable waters are governed by maritime law, because the work has direct relation to navigation and the injury occurs on navigable waters." 248 Mass. at page 37. It was held that the State act did not apply. This court further held that a dry dock designed to receive vessels floating in navigable waters is itself part of the navigable waters and subject to admiralty jurisdiction, citing *The Steamship Jefferson*, 215 U. S. 130, 142, 143, and *The Robert W. Parsons*, 191 U. S. 17, 33, 34. See to the same effect *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171. A decision generally similar to that in *O'Hara's Case* had also been made by this court in *Ahern's Case*, 247 Mass. 512. A repair job on a previously completed vessel has been held to fall within

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Federal jurisdiction, even though the repairs require the laying up of the vessel for a long period, and even though they entirely change the character of the vessel and the uses for which it is adapted. *New Bedford Dry Dock Co.* v. *Purdy*, 258 U.S. 96. *Hillcone Steamship Co.* v. *Steffen*, 136 Fed. (2d) 965, 967. A different rule prevails where the work is being done in the construction of a new vessel, even though in part performed on navigable water, since a contract for new construction is not maritime in character and has no direct relation to navigation or commerce. Such work remains within State jurisdiction. *Thames Towboat Co.* v. *The Francis McDonald*, 254 U.S. 242. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469. *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59, 63-64.

Decisions of the Supreme Court of the United States since *O'Hara's Case* was decided by this court were in accord with the rule there laid down until very recently. *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, 457. *John Baizley Iron Works* v. *Span*, 281 U. S. 222. If the matter rested at this point we should conclude that the decisions above cited furnished the necessary guide and required us to dismiss the claim under the State compensation law, as was done in *O'Hara's Case.*

But the situation was definitely altered by the decision of the Supreme Court of the United States in *Davis* v. *Department of Labor & Industries of the State of Washington*, 317 U.S. 249, written by Mr. Justice Black in 1942. That was not a case of repairs upon a previously completed vessel. It was a case where the employee fell from a barge where he was examining steel that he had just helped to cut from a bridge which was in process of being dismantled. The significance of the case, however, lies in its obvious attempt to set up a means of escape from the difficulties involved in drawing the line between State and Federal authority under the doctrine of the *Jensen* case. The *Davis* case recognizes a presumptive quality in the decisions of Federal authorities under the longshoremen's and harbor workers' act and a presumption of constitutionality of the State acts as applied to particular cases. The decision does not overrule the *Jensen* case. It does, however, at least as appraised by Mr.

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Justice Frankfurter, who concurred in it, and by Chief Justice Stone, who dissented from it, create a "twilight zone" or an area of doubt within which the two acts overlap and the injured workman may recover under either of them. It would seem, therefore, that although apparently some heed must still be paid to the line between State and Federal authority as laid down in the cases following the *Jensen* case, the most important question has now become the fixing of the boundaries of the new "twilight zone," and for this the case gives us no rule or test other than the indefinable and subjective test of doubt. Mr. Justice Frankfurter says that "Theoretic illogic is inevitable so long as the employee . . . is permitted to recover" at his choice under either act. 317 U.S. at page 259. Probably therefore our proper course is not to attempt to reason the matter though and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about "illogic," and to treat the *Davis* case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the *Davis* case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future.

We are the more inclined to include within the "twilight zone" the case of a workman engaged in an ordinary land occupation although occasionally going upon a dry dock or vessel to make repairs because in the latest case of that particular type decided in the Supreme Court of the United States, *John Baizley Iron Works* v. *Span*, 281 U. S. 222, although the case was held to be one exclusively of Federal cognizance, three of the justices dissented, and Mr. Justice Black in his opinion in the *Davis* case refers to the *Baizley Iron Works* case as if it were one of those responsible for

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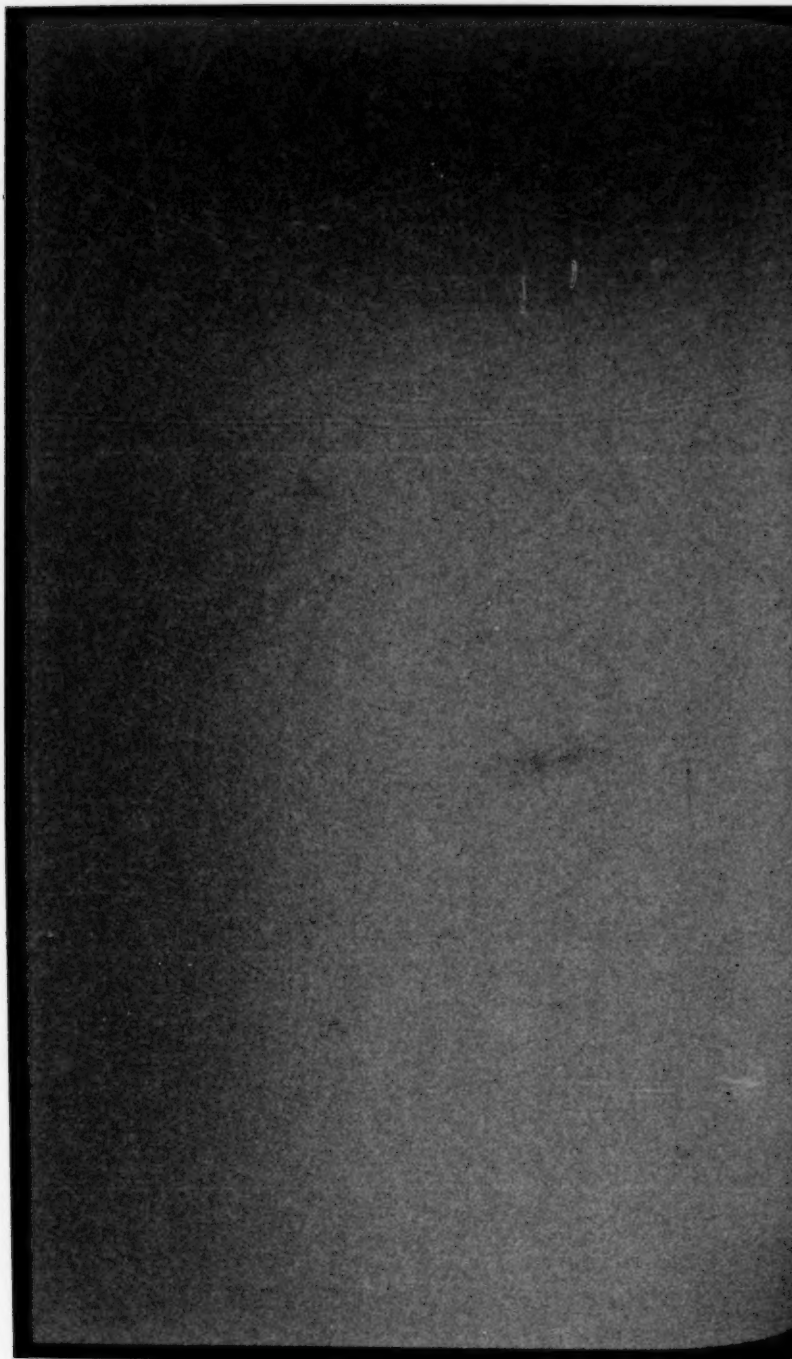
the existing confusion. Moreover, the distinction between working on navigable water in repairing a previously completed vessel and doing precisely the same work on navigable water upon a vessel in process of construction may be thought a narrow one of doubtful practical validity.

For the reasons stated we are of opinion that the case now comes within the workmen's compensation law of this Commonwealth. The Supreme Court of Texas in *Emmons* v. *Pacific Indemnity Co.*, 208 S. W. (2d) 884, sustained State jurisdiction in a very similar case in part for similar reasons. The Court of Errors and Appeals of New Jersey in *De Graw* v. *Todd Shipyards Co.*, 134 N. J. L. 315, upheld State jurisdiction in a similar case but without citing the *Davis* case. The Supreme Court of the United States denied certiorari sub nomine *Todd Shipyards Corp.* v. *De Graw*, 329 U. S. 759. The decision of the Supreme Court of New Hampshire in *Arcand* v. *Gutterson & Gould, Inc.*, 91 N. H. 194, came before the *Davis* case and was what our decision in this case would have been, except for the *Davis* case. Compare *Hardt* v. *Cunningham*, 136 N. J. L. 137.

We think it cannot be said that there was no evidence of partial incapacity due to the injury and continuing after January 2, 1946. There was evidence of loss of strength in the employee's hand and pain in the knuckles caused by this accident. It was for the board to say to what extent the employee's condition might have been improved by more exercise and to what extent he should be chargeable with neglect in this respect.

Decree affirmed.

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Supreme Court of the United States.

OCTOBER TERM, 1948.

No.

BETHLEHEM STEEL COMPANY

v.

ARTHUR J. MOORES.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL.

Introductory Statement.

This brief is submitted pursuant to the provisions of paragraph 3 of Rule 7 in opposition to the appellee's Motion to Dismiss the Appeal on the ground that this Court is without jurisdiction to consider it.

Since the jurisdictional basis for the appeal is set forth in the appellant's Jurisdictional Statement, this brief will not duplicate what appears there. It is intended merely as a brief reply to the appellee's Statement Opposing Jurisdiction.

Argument.

The appellee's argument in opposition to jurisdiction amounts to an assertion that—

> "by the very nature of the court structure in the Commonwealth of Massachusetts there can be no appeal to the Supreme Court of the United States except under unusual circumstances not present here"—

and to a contention that—

> "there is nothing in the record allowing appeal in conformity with the requisite provisions of the appeal statute."

We shall take up these two points in this order.

Appeals to This Court from the Courts of Massachusetts.

Little need be said in reply to the novel proposition that the right of appeal to this Court from the courts of the Commonwealth of Massachusetts is in some way more restricted than is the right to appeal from the courts of other jurisdictions. The governing statutes are the same. There is obviously no warrant and no conceivable reason for according to judgments rendered in the Commonwealth of Massachusetts a higher degree of finality and greater immunity from review by this Court than is given to judgments from other jurisdictions. Whatever "the very nature of the court structure in the Commonwealth of Massachusetts" may be, neither the Judicial Code nor the rules of this Court discriminate against appellants from Massachusetts.

It is true that the situation in Massachusetts in certain types of cases is somewhat complicated with reference to

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the question whether the rescript of the Supreme Judicial Court or the final decree rendered by the Superior Court after such rescript should be the "final judgment" appealed from. See *Cole* v. *Violette*, 319 U.S. 581. It was this uncertainty, and not, as suggested in appellee's Statement in Opposition, any doubt as to the record properly showing jurisdiction, that caused appellant's counsel to secure allowance of its appeal by both the Chief Justice of the Supreme Judicial Court and the Chief Justice of the Superior Court.

Other contentions advanced by the appellee in this connection do not require detailed discussion. That the "original final decree" of the Superior Court (*i.e.*, the decree from which an appeal was taken to the Supreme Judicial Court) was "entered without benefit of assistance from the Supreme Judicial Court" is true, but immaterial. That decree is not appealed from. The final decree of the Superior Court after rescript, which is appealed from, was certainly rendered in pursuance to and in the light of the rescript and opinion of the Supreme Judicial Court. That it was "error of itself" not to have the appeal allowed by a Justice of this Court is obviously a misconception. As for appellant's entitling the appeal in this Court, this seemed the proper practice for several reasons, such as the fact that the state court judge allowing the appeal acts under authority given him by federal statutes and rules and that his allowance of the appeal is not the action of the court over which he presides, and the further fact that the citation on appeal commands the appellee's appearance in this Court. In a number of cases decided by this Court on appeal from Massachusetts in the past, the appeal papers were entitled in this Court. In any event, the caption of a case serves for convenience of reference only and would not prejudice the appeal even if

erroneous, as long as the appeal papers are otherwise proper in respect to substance and form.

JURISDICTION OF THE APPEAL IN THIS CASE.

The appellee contends that the opinion of the Supreme Judicial Court—

> "discloses no question concerning the validity of the Massachusetts Workmen's Compensation Act, Mass. G. L. (Ter. Ed.) C. 152, the only statute of the Commonwealth involved herein. The question presented is one of applicability of the Act to the facts in the case. It has never here been asserted nor does the record show that Act to be repugnant to the Constitution of the United States."

In answer to this, we merely refer to what was said in appellant's Jurisdictional Statement in respect to the fashion in which the federal point was raised and the rulings which give jurisdiction. In the very language of *Wilson* v. *Cook*, 327 U.S. 474, 480, quoted in appellee's Statement in Opposition, the jurisdictional requirement was satisfied since—

> "the record shows that the question of the validity under federal law of the state statute, *as construed and applied*, has either been presented for decision to the highest court of the state, . . . or has in fact been decided by it, . . . and that its decision was necessary to the judgment." (Emphasis the appellee's.)

In fact, the federal question in this case, as shown by the record, was *both* presented to and decided by the high-

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est court of the state, and the opinion of the Supreme Judicial Court—

> "shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States." (*Ibid.*, at 481.)

Conclusion.

It is the belief and therefore the position of the appellant that it is entitled to review of the case by this Court on appeal and as a matter of right. But in the event that this Court should conclude against its jurisdiction on appeal for any reason not now apparent to us, we urge upon this Court the substantial grounds for review set forth in our Jurisdictional Statement as ample reasons why the Court should then consider the case on certiorari pursuant to the provisions of Title 28, United States Code, Section 2103.

Respectfully submitted,

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WM. DWIGHT WHITNEY,
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 369

BETHLEHEM STEEL COMPANY,
Appellant,

vs.

ARTHUR J. MOORES

APPEAL FROM THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS AND THE SUPERIOR COURT OF THE COUNTY OF SUFFOLK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

SAMUEL B. HOROVITZ,
JOSEPH SCHNEIDER,
STANLEY H. RUDMAN,
Counsel for Appellee.

SCHNEIDER, REILLY & BEAN,
Of Counsel.



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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT, IN EQUITY

ARTHUR J. MOORES

vs.

BETHLEHEM STEEL COMPANY

STATEMENT IN OPPOSITION TO JURISDICTION

In accordance with Section 3 of Rule 12 of the rules of the Supreme Court of the United States, the plaintiff-appellee hereby submits his statement in opposition to the jurisdiction of the Supreme Court of the United States to entertain said appeal.

The Statutory Provision as to Mandatory Appeal Is Not Applicable

Title 28 United States Code, Section 1257 (Act of June 25, 1948, Public Law 773 (H. R. 3214), 80th Congress, Second Session) provides the only bases upon which appeal to the Supreme Court of the United States may be taken. That section reads in part:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

It is solely in strict accordance with this section that an appeal may be taken, and when appeal is in accord with the provisions of the section, the same is mandatory and not discretionary with the Court. The purpose of the section is to restrict that mandate, *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 651, and to make certain that the highest court of the state has been informed of the contention that a state statute is alleged to be invalid on federal grounds. See *Wilson* v. *Cook*, 327 U. S. 474, 480 and cases cited. "This jurisdictional requirement is satisfied only if the record shows that the question of the validity of the state statute, *as construed and applied* (italics added), has either been presented for decision to the highest court of the state ——— (omission added) or has in fact been decided by it, ——— (omission added) and that its decision was necessary to the judgment." *Wilson* v. *Cook, supra.*

On page 7 of its statement, the defendant-appellant states, as is true, that the record of the Superior Court of the Commonwealth of Massachusetts is limited to showing its decree. That decree was entered without benefit of assistance from the Supreme Judicial Court, which merely affirmed the decree by order of rescript. Furthermore, normal practice in this Commonwealth is that the record of the case is not sent to the Supreme Judicial Court, but only questions of law upon exception and appeal. When so brought, the litigation of the suit does not terminate until the exceptions or appeal are disposed of and the judgment of the court is remitted to the court below for the purpose of being carried into effect. *Bryan* v. *Bates*, 94 Mass. (12 Allen) 201, 205. See Mass. G. L. (Ter. Ed.) C. 211 Sec. 8. The judgment or affirmation of the same which is contained in an order or rescript of the Supreme Judicial Court to the Superior Court is always recorded only in the Superior Court. G. L. (Ter. Ed.) C. 212 Sec. 9. Thus, the Supreme Judicial Court, except in unusual circumstances, is not a

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court of record, and the record here discloses only normal practice. Therefore, the record of the highest court, the Superior Court, does not disclose that there was any question of the validity of a state statute involved, nor was there any dependency upon the Supreme Judicial Court for the entry of the original final decree.

It may here be noted that counsel for the appellant was apparently aware of the peculiarities of the judicial structure of the Commonwealth. The petition for appeal is addressed to the Supreme Court of the United States. It was not allowed by a member of that tribunal, which is error of itself. But by so addressing the petition, counsel avoided an even more difficult position, for its uncertainty caused it to have the appeal petition signed by both a judge of the Supreme Judicial Court and the Superior Court. It is clear that the difficulty arises from the fact that although the appeal must be from the final decree of the Superior Court, the only claimed error on the record must be in the Supreme Judicial Court. To have addressed the petition to the Superior Court would have immediately shown the paucity of the record; and to have addressed the petition to the Supreme Judicial Court would have been clearly erroneous.

In order to find any question, one must look at the opinion of the Supreme Judicial Court. A copy of that opinion is attached to the statement of the Bethlehem Steel Company as Exhibit "B". It is important to note that the opinion is not certified as a portion of the Superior Court record.

That opinion discloses no question concerning the validity of the Massachusetts Workmen's Compensation Act, Mass. G. L. (Ter. Ed.) C. 152, the only statute of the Commonwealth involved herein. The question presented is one of applicability of that Act to the facts in the case. It has never here been asserted nor does the record show that

Act to be repugnant to the Constitution of the United States.

> "As the record does not show that the plaintiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States." *Wilson* v. *Cook, supra,* p. 481.

Therefore it is respectfully submitted that by the very nature of the court structure in the Commonwealth of Massachusetts there can be no appeal to the Supreme Court of the United States except under unusual circumstances not present here. Secondly, even if it be deemed that an appeal can be taken, there is nothing in the record allowing appeal in conformity with the requisite provisions of the appeal statute.

Conclusion

It is respectfully suggested that the appeal to this Court be dismissed for lack of jurisdiction.

By His Attorneys, SCHNEIDER, REILLY & BRAN,
SAMUEL B. HOROVITZ.

Of Counsel:
JOSEPH SCHNEIDER,
STANLEY H. RUDMAN.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT, IN EQUITY

ARTHUR J. MOORES

vs.

BETHLEHEM STEEL COMPANY

MOTION TO DISMISS APPEAL

Now comes the plaintiff in the above-entitled action and hereby moves to dismiss the appeal of the defendant-appellant, which appeal is addressed to the Supreme Court of the United States; and as cause for the said motion the plaintiff says that said Court is without jurisdiction to consider said appeal.

By His Attorneys, SCHNEIDER, REILLY & BEAN,
SAMUEL B. HOROVITZ.

Of Counsel:
JOSEPH SCHNEIDER,
STANLEY H. RUDMAN.

No. 369. BETHLEHEM STEEL CO. *v.* MOORES. Appeal from the Supreme Judicial Court and the Superior Court

of the County of Suffolk, Massachusetts. *Per Curiam:* The judgment is affirmed. *Davis* v. *Department of Labor*, 317 U. S. 249. *Wm. Dwight Whitney* for appellant. *Samuel B. Horovitz* for appellee. Reported below: See 323 Mass. 162, 80 N. E. 2d 478.